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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1977

NO. 77-635

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WILLIAM C. FRIDAY, Individually,  
and as President of the University of  
North Carolina, et al.,

*Petitioners,*

*v.*

LAWRENCE A. UZZELL and  
ROBERT LANE ARRINGTON,  
Individually, and upon behalf of  
all others similarly situated,

*Respondents.*

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**BRIEF IN OPPOSITION TO  
A PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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OPINIONS BELOW AND JURISDICTION

The Petition accurately states the opinions below in its Appendix, and the statute under which the jurisdiction of this Court is invoked. The opinion of the Court of Appeals for the Fourth Circuit, in banc, is now reported at 558 F.2d 727.

## QUESTIONS PRESENTED

- I. WHETHER TWO STUDENTS HAVE STANDING TO CHALLENGE STUDENT GOVERNMENT REGULATIONS AT A STATE UNIVERSITY WHICH EXCLUDE THEM FROM APPOINTMENTS TO THE CAMPUS LEGISLATURE AND WHICH EXCLUDE THEM FROM APPOINTMENTS TO A CAMPUS DISCIPLINARY TRIAL COURT BECAUSE OF THEIR RACE, AS BEING IN CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.
- II. WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT REVERSING THE DISTRICT COURT'S SUMMARY JUDGMENT FOR THE PETITIONERS AND GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS, WHERE THE PETITIONERS ALONE HAD MOVED FOR SUMMARY JUDGMENT, WAS ERROR IN CONFLICT WITH THE RULES OF CIVIL PROCEDURE.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Petition accurately states the Constitutional Provisions, Statutes and Rules involved in this proceeding.

## RESTATEMENT OF THE CASE

On June 13, 1974, two students at the University of North Carolina at Chapel Hill, a state institution receiving federal financial aid, brought an action in the United States District Court asking declaratory and injunctive relief against three University practices as being in vio-

lation of the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U.S.C. 1983, and the Civil Rights Act of 1964, 42 U.S.C. 2000d. The suit challenged first the subsidization of the Black Student Movement, a campus organization found by the Court below (Petition at A23) to have excluded white students from membership until soon after this suit was filed.

Secondly, it questioned a provision of the Student Government Constitution which requires that there be at least two Black students as members of the Campus Government Council (CGC). Should this number not be elected, or should the resignation or removal of a Black member leave fewer than two Black members on the CGC, then the President of the Student Body is required to appoint one or two additional members. The President may choose any student, so long as the student is Black. Any white student, male or female, is excluded from the list of possible appointments.

The third practice challenged is a provision of the Instrument of Judicial Governance, a regulation adopted jointly by the Student Government and the University. This regulation formalized a practice in effect since 1970, and requires that upon the request of a Black Defendant, who is being tried before the Student Honor Court (SHC) (a judicial body entrusted with the trial and punishment of students) four Blacks would be appointed to the seven judge court which would hear the case. The members of the SHC would be appointed from a body composed of twenty-eight elected members and fourteen appointed members, twelve of whom must also be Black.

In discovery, four past Presidents of the Student Body at the University of North Carolina at Chapel Hill, two of whom are Black, stated that during the school years between 1972 and 1976, two Blacks were chosen by elec-

tion as members of the Campus Governing Council. In 1976, only one Black was elected and a Black student was therefore appointed pursuant to this provision. In 1972, ten Black students were members of the body from which the Honor Courts are chosen, out of a total of forty-two members at which time there was no required minimum representation of Blacks. In 1974, twelve Black students held this office. The President of the Student Body who initiated the move in 1970 to provide for the black quota on the SHC stated that his purpose in so doing was to ensure that "justice was not only done, but was perceived to have been done." The President of the Student Body who initiated the proposal for a minimum number of Black members of the CGC stated that his purpose in so doing was to ensure "protective representation" of Blacks on the CGC. No suggestion was made in the proceedings below that there had been any racial discrimination upon the part of the Student Government of the University of North Carolina at Chapel Hill, nor by the University of North Carolina Administration in connection with the Student Government.

After the parties had engaged in considerable discovery with respect to federal financial aid to the University, the effect of the challenged practices, and the number of Blacks holding office in the CGC and the SHC before and after the adoption of the practices, the Petitioners, herein referred to as the Defendants, moved for summary judgment, which motion the District Court granted. The District Court held that the claims relating to the Black Student Movement were moot in that, following the commencement of the action, the Black Student Movement had opened its membership to white students, and the court was assured that this discrimination would not reoccur. The court held that the Plaintiff had standing to challenge the practices regarding the CGC and the SHC, but that they had not presented a justiciable case or controversy.

The Respondents, herein referred to as the Plaintiffs, appealed. The Court of Appeals for the Fourth Circuit affirmed the granting of summary judgment in favor of the Defendants with regard to the financial subsidy by the University of the Black Student Movement, but reversed the summary judgment ruling on the question of minority representation on the CGC and the SHC, and remanded with directions that the District Court should enter summary judgment for the Plaintiffs on these two issues. The Defendants filed a timely petition for rehearing before the Court of Appeals *in banc*, upon the basis that "the defendants should be given the opportunity to present evidence before either this Court or the District Court in support of their decisions with respect to the appointment and membership of minority representatives in the CGC and for appointment to the SHC." The Defendants, in their petition, did not further elaborate on what evidence they would present before the Court of Appeals or the District Court.

The motion for rehearing was denied on February 18, 1977, and the mandate of the court issued. Thereafter, on March 24, 1977, the Court, upon its own motion, recalled the mandate, reconsidered the denial of rehearing, and ordered rehearing *in banc*. Upon rehearing the Defendants filed a supplemental brief, wherein they stated the issue to be "did the court err in granting Defendants' motion for summary judgment on the issues concerning the CGC and the SHC because the Plaintiffs are in no way deprived or discriminated against from the classifications and therefore no cognizable discrimination which would warrant relief is present?" In arguing this issue, the supplemental brief does not give any suggestion as to what problems or deficiencies the Defendants sought or might have sought to remedy and what compelling state interest they sought or might have sought to promote by the racial discrimination practiced under the challenged regulations.

Upon rehearing *in banc*, an order was issued affirming the decision of the three judge panel subject to certain additions. Judges Winter, Haynsworth and Butzner dissented.

Defendants applied for a stay of mandate on August 12, 1977, and on September 30, 1977, the stay was granted by the Court of Appeals, pending disposition of this petition for certiorari.

1. WHETHER TWO STUDENTS HAVE STANDING TO CHALLENGE STUDENT GOVERNMENT REGULATIONS AT A STATE UNIVERSITY WHICH EXCLUDE THEM FROM APPOINTMENTS TO THE CAMPUS LEGISLATURE AND WHICH EXCLUDE THEM FROM APPOINTMENTS TO A CAMPUS DISCIPLINARY TRIAL COURT BECAUSE OF THEIR RACE, AS BEING IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

*A. Plaintiffs Clearly Satisfy the General Test of Standing as Articulated by This Court.*

The Defendants have contended that the Plaintiffs have no standing because they were purportedly not excluded from or discriminated against in connection with the programs in question. This is simply not the case. Under the regulations enforced by the University of North Carolina at Chapel Hill, white students are excluded from twelve seats on the forty-two member body from which trial committees are chosen and from four seats on the University trial court committee which tries a Black student, who does not wish to be tried by a racially non-discriminatory court. The procedure specifically pro-

vides that, upon request of a Black defendant, four of the seven members of the court which will try him are chosen from a "pool". The "pool" is composed of the potential judges who are Black. All white students are excluded from this "pool". A Black Defendant may thereby entirely exclude the possibility of being tried by a white majority court. White students are further excluded from consideration when additional members of the CGC are appointed because of an insufficient number of Blacks. The President of the Student Body makes appointments only from among Black Students.

The function of the standing doctrine is to ensure that suits are brought by a person who is the proper party to request an adjudication of a particular issue.

"Thus, in terms of Article III limitations on federal court jurisdiction the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution . . . . Our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 101-102.

In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), the Court established a two-fold test of standing. "The first question is whether the Plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 397 U.S. at 152. Second, the injury must be to an interest of the Plaintiff with which interest, "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest,

at times, may reflect 'aesthetic, conservational and recreational' as well as economic values." 397 U.S. at 153-154. Even spiritual interests will suffice. 397 U.S. at 154.

In the more recent decision of *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), the Court further defined and utilized the test established by *Association of Data Processing Service Organizations v. Camp*, *supra*. The action there challenged was the allowance of a proposed increase in railroad rates for recyclable commodities by the Interstate Commerce Commission. The Plaintiffs were, according to their allegations, persons who had used the "...forests, streams, mountains, and other resources of the Washington metropolitan area for camping, hiking, fishing, and sight-seeing, ..." 412 U.S. at 685. They alleged that they were injured because, "... a general rate increase would allegedly cause increased use of non-recyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in the national parks of the Washington area." 412 U.S. at 688. This was found to allege, "... a specific and perceptible harm that distinguished them from other citizens..." 412 U.S. at 689.

The question of standing, therefore, as the District Court correctly stated, is the question of whether the interest of the Plaintiffs which are threatened or injured by challenged state practices and sought herein to be protected is within the zone of interests protected by the statute and constitutional provision invoked. The Plaintiffs contend that Title VI seeks to protect the right of all persons who participate in programs subsidized by the

central government to be free from racial discrimination in their enjoyment of those programs and benefits. They contend that the Fourteenth Amendment, enforced through the Civil Rights Act of 1871, seeks to protect the right not to be compelled to subsidize, through mandatory student fees, a racially discriminatory program, and the right to attend a state supported institution of higher education which is free from officially sanctioned and imposed racial discrimination. Both provisions seek to protect the right not to be excluded from an office, even a student government office, upon the basis of race.

The Plaintiffs, among all other students at the University, have these rights, and the practices and provisions of the Defendants violate these rights.

*B. Plaintiffs Satisfy the Specific Tests of Standing to Bring Actions Under 42 U.S.C. 1983 and 42 U.S.C. 2000d.*

Both the District Court (Petition at A26-27) and the Court of Appeals (Petition at A9), found that the Plaintiffs had standing to challenge the validity of these regulations. When the President of the UNC Student Body made appointments to the CGC and the SHC pursuant to the challenged provisions, he passed over the Plaintiffs and did not consider appointing them, solely because of their race. When the responsible officers of the SHC made appointments from the already racially appointed SHC, to trial courts trying a Black, in choosing four of those seven judges, they passed over the Plaintiffs, again solely because of their race. This is the same nature of injury which was suffered by the Plaintiffs in *Carter v. Jury Commission of Greene County*, 396 U.S. 430 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970), a deprivation of a civil and political right on account of race.

The Defendants claim that the fact that the Plaintiffs have not been subject to disciplinary proceedings shows that they have not been injured by the racial discrimination in the selection of the SHC, and therefore lack standing to challenge the selection procedure.

This Court, in *Carter v. Jury Commission of Greene County, supra*, held that each citizen has a right not to be excluded from service upon a jury because of his race.

"Defendants in criminal proceedings do not have the only cognizable legal interest in non discriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion. Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of civil suit such as the one brought here. The federal claim is bottomed on the simply proposition that the State, acting through its agents, has refused to consider the appellants for jury service solely because of their race. Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise. Once the State chooses to provide grand and petit juries, ... it must hew to federal constitutional criteria in ensuring the selection of membership is free of racial bias." 396 U.S. 320, 329-30.

More recently, Mr. Justice Powell, in his dissent in the case of *Castaneda v. Partida*, 430 U.S. 482 (1977), stated,

"Were it not for the perceived likelihood that jurors will favor defendants of their own class, there would

be no reason to suppose that a jury selection process that systematically excluded the persons of a certain race would be the basis of any legitimate complaint by criminal defendants of that race. *Only the individual excluded from jury service would have a personal right to complaint.*" 430 U.S. at \_\_\_, 97 S.Ct. 1272, 1291 (1977) (emphasis added).

The Plaintiffs contend, that by clear analogy, each student has a right not to be excluded from service upon the SHC, which is analogous to the petit jury and the grand jury of the court systems of the states of Alabama and Texas.

With regard to the exclusion of the Plaintiffs from appointment to the CGC, the Court in *Turner v. Fouche, supra*, said as follows:

"We may assume that the appellants have no right to be appointed to the ... board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." 396 U.S. at 362-63.

The Plaintiffs do not contend they have a right to be appointed to either the CGC or SHC, but they believe that they have a right not to be excluded from the list of potential appointees because of their race. Because they are excluded from this program, denied its benefits and, refused participation, because of their race, they are denied the equal protection of the laws guaranteed by the Fourteenth Amendment.

The decisions of this court, and the courts below, have been unanimous in holding that students have standing under 42 U.S.C. 1983 to challenge racial discrimination in extra curricular activities sanctioned or imposed by school authorities. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

Further arguments supporting the standing of the Plaintiffs to bring this action are found among the Federal Regulations adopted to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Title VI prohibits racial discrimination against any person. The statute "tolerates no racial discrimination, subtle or otherwise." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 281 note 8 (1976) (emphasis by the court); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 801 (1973).

The regulations adopted by the Department of Health, Education and Welfare immediately following the enactment of Title VI reflect that the Plaintiffs plainly fall within the zone of interests sought to be protected by the Act.

45 CFR 80.3(b) (iv) provides that one may not lawfully "... restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program." (Effective as of January 5, 1965).

45 CFR 30.3(b) (vii), adopted eight years later, provides that one may not lawfully "... deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program." (Effective as of July 5, 1973).

45 CFR 80.13(g) defines a "benefit" of a program to include "any ... benefit provided with the aid of federal

financial assistance ... and any ... benefits provided in or through a facility provided with the aid of federal financial assistance..."

In *Lau v. Nichols*, 414 U.S. 563 (1974), non-English speaking chinese students claimed that the San Francisco Unified School District was providing them with unequal educational opportunities in violation of Title VI. This court sustained the allegation of discrimination, and implicitly recognized the standing of a person subjected to the discrimination and the denial of the benefits, to bring a civil action. See also *Boissier Parish School Board v. Lemmon*, 370 F.2d 847, 851-52 (5th Cir.), *Natonabah v. Board of Education*, 355 F.Supp. 715, 724 (D.N.M. 1973). Title VI seeks to protect all citizens in the same situation as the Plaintiffs, that is, all persons being excluded from a program which receives federal funding.

On the question of standing, the Plaintiffs clearly have met the tests set forth by this Court, and there is no question of law of sufficient importance which ought to be resolved by this Court involved.

2. WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT REVERSING THE DISTRICT COURT'S SUMMARY JUDGMENT IN FAVOR OF THE PETITIONERS AND GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS, WHERE THE PETITIONERS ALONE HAD MOVED FOR SUMMARY JUDGMENT, WAS ERROR IN CONFLICT WITH THE RULES OF CIVIL PROCEDURE.

The decision of the Court of Appeals, *in banc*, that summary judgment ought to be granted for the Plaintiffs

can be supported on several theories of the law. Each of these theories is consistent with the holding of this Court and with the decisions of the several courts of appeal. Each of these theories finds ample support in the record which was before the court below.

*A. There is no State Interest Sufficiently Compelling in These Circumstances Which Will Justify the Unequal Burdening of a Person Because of His Race Under the Fourteenth Amendment.*

This court has ruled that a state regulation which discriminates among citizens upon the basis of their race is suspect and can only be justified if the same is necessary to promote a compelling state interest. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

A regulation which does not promote such a compelling state interest and is not necessary in its entirety to promote such an interest is void as a violation of rights guaranteed by the Fourteenth Amendment. *Dunn v. Blumstein*, 405 U.S. 330, 343-4 (1972); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964).

The Courts have held that the remedying past government racial discrimination is a compelling state purpose which will temporarily justify racial classifications. E.g. *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*; *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977). In these cases, however, the Courts, while utilizing racial classifications and statistics in framing a remedy, did not place unequal burdens upon either race, or exclude any citizen from the programs in question because of their race. In contrast to the facts

here, racial discrimination in the particular circumstances was alleged and found, either by the judicial or, in *Carey*, *supra*, by the legislative branch, and the need for remedial racial classification determined prospectively by the appropriate governmental agency.

In no case since the Japanese cases in World War II has the court sustained the burdening of one group upon the basis of their race, even for remedial purposes. See *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976).

*B. There is No Governmental Interest Sufficiently Compelling to Rationalize Discrimination Under Title VI.*

The Plaintiffs would contend that under the provisions of Title VI of the Civil Rights Act of 1964, racial discrimination can be utilized, if at all, only for remedial purposes when found necessary for that purpose by a federal court. The federal government has established through this statute, that a necessary condition for receipt of federal funds is that there shall be no racial discrimination of any kind or for any reason in any program or facility which receives or utilizes those federal funds. Congress, by this statute, has determined that there are no compelling governmental interests sufficient to justify racial discrimination in programs receiving federal funds. This judgment of the Congress cannot be overruled, modified, or construed except perhaps by federal courts, and must necessarily prevail over any decision, however benign and beneficial, by a local government body, a state legislature, or a student council. To permit otherwise would allow a local legislative body to substitute its own values and priorities for that of the federal government in matters concerning the spending of federal money.

The case of *United Jewish Organizations of Williamsburg, Inc., v. Carey*, *supra*, which the Defendants have invoked, clearly relies upon a particular statute, the Voting Rights Act of 1965, to justify the use of racial criteria to equalize the voting strength of Blacks as a whole, and the finding that no individual was unequally burdened and, therefore, that no individual was subjected to discrimination, because of their race. In this case, individuals are, in fact, burdened unequally because of their race, and the statute in question, Title VI of the Civil Rights Act of 1964, clearly prohibits racial discrimination.

*C. Any Rationalization of Racial Discrimination Must Have Been Made Prospectively.*

In order to meet the test of a compelling state interest the Defendants must show that the purpose and justification for regulation which enforces a distinction made on the basis of race was actually the motivation for its enactment, not merely a post-facto rationalization. A purpose never considered or adopted by the proper authoritative agency of the State's power cannot supply a compelling interest or even a rational basis for a state enactment. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 510 F.2d 512, 530 (2nd Cir. 1974) (Frankel, D.J., dissenting).

The discrimination cannot be accomplished thoughtlessly or covertly, then justified after the fact. The Defendants cannot sustain their burden of justification by coming to court with an array of hypothetical and post-facto rationalizations for discrimination that has already occurred either without their approval or without their conscious and formal choice to discriminate as a matter of official policy. It is not for the court to discover and articulate a rational or

compelling basis (or something in between) to sustain the questioned state action. That task must be done by appropriate state officials *before* they take any action.

*D. The Prospective Rationalizations Advanced by the Defendants are Insufficient to Justify Racial Discrimination.*

The only two justifications for racial discrimination, that the discovery, brief, and motions, suggest might have been proposed at the time of the enactment of these regulations are that the quotas in the CGC were enacted to provide "protective representation", and that the racial majority provisions on the SHC were enacted to provide for "the appearance of justice". No other justification was advanced under any guise contemporaneously with the enactment of the regulations in question.

To exalt "protective representation" for Black students to the status of a compelling state interest, and similarly to exalt "the appearance of justice" for Black students, contravenes the facts as well as the law. During the 1972-1976 period, Blacks held, at one time or another, all of the high offices of student government: Two of the four Student Body Presidents, the "Chief Justice of the Student Supreme Court" during the entire period, at least two members of the CGC elected each year except 1976, and one elected that year. Blacks possessed sufficient political pull to secure substantially disproportionate appropriations totalling over \$40,000.00 between 1969 and 1975 to a campus organization, the "Black Student Movement" which the Court below found to have an all black membership and to have excluded whites from applying for membership until three months after the filing of this civil action.

Black students hardly needed protective representation. The record further discloses no absence or wanting of actual justice in the student disciplinary hearings, nor even an allegation of the same, but the record does disclose that not even all black students have felt it necessary to request a "racial majority court". The proponents of the racial courts wish to promote "the appearance of justice", where actual justice is not questioned by those concerned. No court has ever recognized such purported interests of the state to have the status of a "compelling state interest." No citation is made to support the contention. Further, the concept of "protective representation", either in the SHC or the CGC, is founded on a concept of racial solidarity rejected by this court in *Castaneda v. Partida*, 430 U.S. 482. These two "interests" hardly rise to meet the test of a "rational basis" let alone the stringent standards of a "compelling state interest." *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); Cf. *Dunn v. Blumstein*, *supra*; *Loving v. Virginia*, *supra*; *McLaughlin v. Florida*, *supra*.

*E. The Retrospective Rationalization Advanced by the Defendants is Insufficient to Justify Racial Discrimination.*

In retrospect, the Defendants have attempted to rationalize the SHC provisions upon grounds that "such a provision ... merely ensures that a defendant is judged by a jury representative of the community ... [by] a system which provides better peer representation for a defendant..." (Petition at 12).

Such a justification is based upon the proposition that a jury composed of a majority of the same race as the

Defendant is necessary to provide an impartial jury of one's peers. If such a regulation be necessary to promote this compelling state interest, then any jury selection system which does not provide racial majority representation in each jury necessarily therefore fails to achieve that same compelling state interest, a jury of one's peers. For if such a system of racial quotas is necessary at UNC, then it is necessary throughout the nation. If such a system is not necessary in all courts, some of which have been proven to have practiced racial discrimination in the selection of juries in the past, then it is hardly necessary to promote this admittedly compelling state interest at Carolina. This requirement of racial representation on juries is contrary to the holdings of this Court in *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Carter v. Jury Commissioners of Greene County*, *supra*, and *Hernandez v. Texas*, 347 U.S. 475, 477 (1954), which specifically deny that any racial representation on a jury is necessary for a trial by a jury of one's peers.

The regulations certainly cannot be upheld on these grounds, and any evidence supporting such a rationale would be irrelevant to the question of the justification of racial discrimination.

*F. The Rationalization of Racial Discrimination, if any, Was Made by an Unauthorized and Improper State Agency.*

The record does not disclose that the Board of Governors of the University of North Carolina, the Board of Trustees of its Chapel Hill Branch, or the President or Chancellor, have ever considered a decision to discriminate upon the basis of race as a matter of official policy in connection with these regulations. If there was such a decision, it was made by the Student Government alone.

However, the Student Government at the University of North Carolina at Chapel Hill is hardly the agency entrusted by the State of North Carolina with the responsibility of determining, articulating and promoting "compelling state interests." The record shows its powers as prescribed by regulation to be somewhat more modest. It therefore cannot invoke the power of the state to promote "compelling state interests," in order to justify its acts and decisions. *Hampton v. Mow Sun Wong*, 96 S.Ct. 1895, 1905-06, 1910 (1976); *Sweezy v. New Hampshire*, 354 U.S. 234, 251-54 (1967).

The Student Government therefore had no authority to make such a decision, and any evidence of its acts, being ultra vires in the most thorough sense, could not justify racial discrimination.

*G. Racial Discrimination Violates a Fundamental University Regulation.*

If there were compelling state interest which the proper officials of the University were seeking to advance through quotas and racial discrimination, it would seem highly suspect that the basic regulations of the University (entitled "The Code") fail to disclose them. See *Bakke v. The Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152 (1977). Indeed, according to the Code, which was before the court below, the most compelling state interest would be the absence and the elimination of racial discrimination at the University, not its purported remedial use.

The Code of the University provides:

"Section 103. Equality of Opportunity in the University. Admission to, employment by, and promotion

in the University of North Carolina and all of its constituent institutions shall be on the basis of merit, and there shall be no discrimination on the basis of race, color, creed, religion, sex, or national origin."

It is by now familiar law that an agency's violation of its own regulations may in and of itself constitute a violation of the rights of the Plaintiffs. *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1974); *United States v. Leahey*, 434 F.2d 7 (1970); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969). Such deviations "... cannot be reconciled with the fundamental principles that ours is a government of laws, not men." *Hammond v. Lenfest*, 398 F.2d 705, 715 (2nd Cir. 1958). It is irrelevant that a policy may be "more generous than the constitution requires." *United States v. Heffner*, 420 F.2d at 812; *Service v. Dulles*, 354 U.S. at 388.

As the record now stands, therefore, the University has formally enacted a policy by which it rejected race as a proper criteria for decision making in the University. There is, then, no legal basis for conflicting regulations which discriminate upon the basis of race which have been made by the Student Government, a subordinate agency of the University. A regulation promoting a purported compelling state interest enacted by any University official which is in conflict with this fundamental regulation would therefore be void, and could not justify racial discrimination.

*H. To Show Harmful Error, the Defendants Must Have Presented a Legal Theory of a Compelling State Interest Justifying Racial Discrimination and Supported by Evidence, Which was Not Considered Below.*

Throughout the proceedings in this law suit, the Defendants have defended their practices upon the basis that they did not discriminate against the Plaintiffs, and, therefore, did not have any obligation to justify their regulations.

Even though the existence of such a justification would be a matter of affirmative defense and avoidance, and the burden of proving the sufficiency of the defense would be clearly upon the Defendants, no such compelling state interest was plead in the Answer. Fed. R. Civ. P. 8(c); See 5 *Miller and Wright, Federal Practice and Procedure*, §1271.

In their petition for rehearing, the Defendants first claimed that they could and would show the Court of Appeals that they had a legal theory supported by evidence not considered below to present the court concerning a purported purpose of remedying past discrimination and other compelling state interests which as a matter of law justified the discriminatory regulations. However, upon rehearing, in their supplemental brief, they disclosed no such theory, no such compelling state interest, and no such remedial intentions. They merely denied again that they had ever practiced racial discrimination against the Plaintiffs. The Court of Appeals therefore had no opportunity to determine whether their previous grant of summary judgment for the Plaintiffs had excluded possibly material evidence from consideration. *Palmer v. Hoffman*, 318 U.S. 109, 116, 118 (1943); *Shachtman v. Dulles*, 225 F.2d 933, 943 (D.C. Cir. 1955).

The Defendants have yet to suggest, in the pleadings, briefs, motions, affidavits or responses to discovery, what compelling state interest (other than the three possibilities casually mentioned in their Petition and in the brief below) caused them to enact the two racially discriminatory regulations. Nowhere have they suggested that there are legislative or judicial findings, minutes, transcripts, documents or other evidence which support a claim that the decision to discriminate was made for such an as yet undisclosed lawful purpose. Rather, the Defendants, "... submit that they should be allowed to present evidence related to discrimination at the University, *if any*, the need for remedial measures, and how the measures have operated." (Petition at 17, emphasis added).

If error by the Court of Appeals is to be shown, the Defendants must at least submit, if not plead, that there is actual evidence of racial discrimination in the operation of student government and student discipline at the University of North Carolina at Chapel Hill, and a conscious and formal decision by the appropriate authorities to remedy the same through the challenged regulations, not merely that there *might be* such evidence. The Defendants must at least submit, if not plead, that there is actual evidence of a decision to adopt the challenged policies for the purpose of promoting a legally sufficient compelling state interest, not merely that there *might be* such evidence. See, *Palmer v. Hoffman*, *supra*; *Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976); *Baker v. Chicago, Fire & Burglary Detection, Inc.*, 489 F.2d 953 (7th Cir. 1973); *Green v. James*, 473 F.2d 660 (9th Cir. 1973); *Shachtman v. Dulles*, *supra*, 5 *Wright and Miller, Federal Practice and Procedure*, §1278.

Since the Defendants have never revealed the theory upon which they would justify their regulations as a matter of law, they can hardly be heard to contend that the Court of Appeals committed prejudicial error in declining to remand for the presentation of evidence which is not necessarily sufficient as a matter of law to justify their act and which the Defendants are not themselves certain they can ever produce. For error to be prejudicial, the legal theory must be valid and the unconsidered evidence must be more than hypothetical.

### CONCLUSION

The Plaintiffs in this law suit have been excluded from certain appointments to offices under the University of North Carolina solely because of their race. This subjected them to racial discrimination and denied to them the equal protection of the laws, in violation of the Civil Rights Act of 1964 and the Fourteenth Amendment. The injury which they suffered thereby is precisely the harm which both provisions were enacted to prohibit, and their right to challenge the University regulations is clear.

In the course of these proceedings, the Defendants have mentioned three possible rationalizations for their regulations, none of which were considered by the appropriate University officials, none of which are consistent with fundamental University regulations, and none of which are legally sufficient to justify racial discrimination. The Defendants now ask for still another opportunity to articulate some as yet undisclosed compelling state interest as a justification of their actions. This desire, however, does not make this case sufficiently important to warrant the exercise of this Court's jurisdiction by the issuance of a Writ of Certiorari.

Respectfully submitted, this 5th Day of January, 1978.

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